Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-638

In The

Supreme Court of the United States

October Term, 1989

HARRY M. CARVALHO,

Petitioner,

v.

"ANDREA C," her engines, tackle apparel, and furniture; and ANDREA C FISHING CORPORATION, a Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

I. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED TO SEAMEN BY THE DOCTRINE OF UNSEAWORTHINESS.

II. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMEN UNDER THE JONES ACT.

LIST OF PARTIES

The parties to the proceedings below were the petitioner HARRY M. CARVALHO and the respondents "ANDREA C" and the ANDREA C. FISHING COMPANY.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Harry M. Carvalho, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been certified for publication. It is attached hereto in the appendix, page A-15.

The memorandum decision of the United States Court for the Southern District of California is attached hereto in the appendix, page A-1.

JURISDICTION

Invoking federal jurisdiction under 46 U.S.C. 688 (the Jones Act) and under the general maritime law, the petitioner brought this suit in the Southern District of California. On July 11, 1986, after a court trial, the Southern District issued its decision in favor of respondents, finding no unseaworthiness under general maritime law or negligence under the Jones Act.

Petitioner appealed, and on July 14, 1989, the Ninth Circuit entered judgment affirming the District Court. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

46 U.S.C. 688

STATEMENT OF THE CASE

On November 17, 1982, Petitioner Harry M. Carvalho was a 25 year old tuna fisherman employed as a crew member aboard the defendant vessel, the "Andrea C." Carvalho had been a tuna fisherman for about six years previously, having entered the profession from high school.

During those six previous years, Carvalho had suffered various injuries to his body, including his back. These injuries were known to the defendants prior to the accident herein.

On the morning of November 17, 1982, the "Andrea C" was tied parallel to a dock in Panama. The vessel, through its agent, had ordered a truckload of sacks of salt which it intended to load and then transfer at sea to a sister ship whose supplies of salt were running low.

A large flatbed truck measuring about eight feet wide arrived at the dock and parked parallel to the vessel. In the bed of the truck nearest the cab were in excess of 100 sacks of salt, each weighing 100 pounds.

The salt sacks were leaking, and salt was strewn over the wood and metal truck bed, creating a slippery and unstable surface.

The person normally in charge of unloading salt was the deck boss, but the defendant vessel had not hired a deck boss at the time of the accident. Supervision of the unloading procedure was thus assumed by the Navigator, Matt Giacalone. He ordered Carvalho and one other crewman, Ricky Shelton, to assist him in unloading the 100 sacks of salt.

Matt Giacalone directed Ricky Shelton to spread a cargo net directly on the deck between the ship and a couple of feet away from the side of the truck. Giacalone stood facing the stack of salt sacks on the side of the truck nearest the cargo net. He would grab each sack and swing it out and down into the cargo net.

Carvalho took his position on the other side of Giacalone. He would pick up each sack, carry it across the salt-strewn truck bed around Giacalone, and then throw each salt sack the couple of feet to the net.

After 45 minutes to an hour of lifting, carrying, and throwing these 100 pound sacks, Carvalho suffered permanent and crippling injuries to his back.

At trial, the Court ruled that Carvalho was injured when he "lifted the salt bag and hurt his lower back, a back previously weakened by several other injuries." (Appendix Page A-7.)

Carvalho appealed, arguing that the work method used was unsafe, and hence unseaworthy under the general maritime law, and the negligence of the vessel in adopting this method constituted negligence under the Jones Act.

The Ninth Circuit affirmed the lower court, adopting as not clearly erroneous the lower court's finding that "a reasonably fit seaman is able to carry one hundred pound bags of salt." (Appendix, Page A-22.)

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED TO SEAMEN

The American system of laws regarding seamen has evolved from the historic recognition that seamen are required to endure special perils and hardships, and are thus entitled to special protection. This protection includes "indemnity" for injuries resulting from a vessel's unseaworthiness, and establishes that unseaworthiness can occur from the hiring by a vessel of employees physically or emotionally unable to perform their duties. *The Osceola*, 189 U.S. 158 (1903); Comment, *Application of the Jones Act to an Assault by a Ship's Officer on a Member of Its Crew*, 4 Tul. L. Rev. 120, 123-24 (1929); *Boudin v. Lykes Brothers Steamship Co.*, 348 U.S. 336 (1955).

Against this necessarily brief overview of the controlling law of unseaworthiness, the decision of the lower court does not withstand logical scrutiny.

It is undisputed that the defendant hired Carvalho knowing he had suffered prior back injuries. The defendant obviously cannot claim it intentionally hired Carvalho and assigned him work it knew he could not perform. To the contrary, by employing Carvalho with knowledge of his physical condition, the vessel warranted to him and the rest of the crew that he had recovered from his previous injuries and was equal to the tasks he would be ordered to perform.

This warranty is absolute, non-delegable, and if a breach occurs, recovery must be awarded to the seaman

proximately injured by the breach. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 566 (1944).

The breach of this warranty cannot be disputed, for the Ninth Circuit held, at page eight of its Judgment, that "reasonably fit seamen are capable of performing lifting tasks similar to the one performed by Carvalho." Therefore, Carvalho was not a reasonably fit seaman.

As to proximate cause, the District Court found Carvalho was injured "when he lifted the salt bag and hurt his lower back, a back previously injured by several other injuries." (Appendix, Page A-7.)

The fact that Carvalho's unfitness resulted in injury to himself rather than to a fellow crewman makes no difference in liability; at most, it creates an aggravation situation pertinent only to damages. As stated in *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 727-28:

> If four men had been assigned to uncoil the [eight inch thick] rope but two of the men lacked the strength of ordinary efficient seamen, the [injured seamen] would again be protected.

In conclusion on this issue, the Judgment of the Ninth Circuit effectively punishes Carvalho for accepting employment and performing (at least as long as his back held out) the work assigned to him. The Judgment furthermore rewards a defendant vessel for being wrong in telling a seaman he is fit for duty. If the seaman is injured, the vessel can claim it was caused by the seaman's previous injury. If the seaman is not injured, the vessel obtains the benefits of his labors.

Therefore, the Judgment of the Ninth Circuit does not recognize "the helplessness of the men to ward off the

perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy of the doctrine of unseaworthiness . . . ,' " *Reed v. The Yaka*, 373 U.S. 410, 413 (1963).

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMEN UNDER THE JONES ACT

As a reaction to several court decisions that acted to limit the recovery of seamen, Congress first passed the Jones Act in 1920, subsequently codified at 46 U.S.C. 688 (1976).

The act provided, in part, for recovery of damages for injury or death resulting from the negligence of the owner, master or fellow crew member.

The greatest distinction between unseaworthiness and Jones Act negligence is in proof of causation. While unseaworthiness requires proximate cause, the Jones Act merely requires that the breach of duty by the defendant play any part, even the slightest, in producing the injury. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521.

In the instant case, Carvalho argued on appeal that the vessel was negligent in ordering him to repetitively pick up each individual sack, walk with it across the truck bed, and throw each weight several feet.

The Ninth Circuit rejected this argument, stating at page 8 of its decision, there was "testimony suggesting

that reasonably fit seamen are capable of performing lifting tasks similar to the one performed by Carvalho."

However, none of the "suggestive" testimony cited by the Ninth Circuit supports its conclusion. This is so because the testimony in question consisted of several witnesses stating a seaman should be able to pick up *one* sack and carry it a short distance. No witness was ever asked if an able-bodied seaman could *repetitively* pick up, carry, and throw these weights for 45 minutes to an hour, the length of time crewman Ricky Shelton estimated had elapsed at the time Carvalho was injured.

Lacking any direct testimony on this critical issue, the lower court apparently decided that if a seaman can lift, carry and throw one sack, his employer can order him to repeat this process indefinitely. And if the seaman's body finally gives out, the vessel can claim that its orders played no part in causing the injury, the seaman was simply not up to the task.

CONCLUSION

The decision of the Ninth Circuit removes seamen from their historically protected status as wards of the Court. It instead returns them to their status at the dawn of the maritime industry, namely wards of the vessel, wards whose misfortune to become injured simply resulted in their being abandoned at the nearest port.

Harry Carvalho was treated like a machine, and he acted like a machine until he broke. If he had been injured by a cable that snapped because it could not

repetitively lifted one hundred pounds, he would be entitled to recovery. Yet the instant decision denies him recovery for injuries caused when his back "broke." The maritime law does not permit broken seamen to be cast aside like broken machines, and it is therefore requested that this Petition for Certiorari be granted.

Respectfully submitted,

DATED: October 12, 1989

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Counsel of Record

DONALD F. HILDRE
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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARRY M. CARVALHO, Plaintiff, v. "ANDREA C" her engines, tackle, apparel & furniture, and ANDREA C Fishing Corp., a corporation, Defendants.	Civil No. 84-1516-K (CM) FINDINGS OF FACT AND CONCLUSIONS OF LAW (FILED JULY 9, 1986)

This matter came before the court on May 20, 1986 for jury trial. On the day of trial, both parties waived jury. Court trial commenced May 20, 1986 and concluded June 11, 1986. Having considered the evidence and arguments of counsel, the court makes the following findings of fact and conclusions of law.

Jurisdiction of the court is based on the general maritime law of the United States of America (unseaworthiness claim) and the Merchant Seaman's Act of June 5, 1920, hereafter called the Jones Act (negligence claim) 46 U.S.C. § 688. Venue is based on plaintiff's residence, which is the Southern District of California.

Plaintiff is a 29-year old tuna fisherman who is before the court claiming damages for alleged injuries to his back incurred while unloading salt form a flat bed truck in Panama.

In November 1982, plaintiff was a crewman aboard the defendant vessel M/V Andrea C. The Andrea C was

in port in Panama obtaining supplies for an impending tuna fishing trip. The captain of the M/V Uncle Louis, defendant's sister ship, requested that the captain of the Andrea C pick up some salt bags in Panama and deliver them to the Uncle Louis at sea.

In the morning hours of November 19, 1982, a flat bed truck containing over one hundred 100-pound salt bags arrived. Navigator Matthew Giacalone yelled for the crew to help him unload salt. No one assigned to specific tasks the crew members who responded. Rather, they assigned themselves to perform different aspects of the job. *Plaintiff and Giacalone* jumped on the back of the salt truck parked parallel to the M/V Andrea C. Between the Andrea C and the truck was dock space on which the cargo net was placed. Plaintiff and Giacalone dropped salt bags from the truckbed to the cargo net. When the cargo net was full, Ricky Shelton hooked the cargo net to the ship's cherry picker, and the contents of the cargo net were dropped into the hold; other crew members stacked the salt bags in the hold.

Giacalone stood on the side of the flat bed closest to the cargo net. He essentially picked up the salt bags and threw them over the side onto the cargo net. Plaintiff assumed the side of the truckbed farthest from the cargo net. His procedure was to pick up a bag, carry it 6-8 feet to the opposite side of the truck, swing it and drop the salt bag into the cargo net. There was loose salt on the bed of the truck. While unloading the salt in this fashion, plaintiff injured his back. He was in severe pain and, after a few moments, was helped onto the vessel. He was taken to a clinic where he was told he had no serious injuries

and would be better the new day. Still in pain and dissatisfied with this advice, plaintiff went to another doctor, Dr. Angulo, the next day. Dr. Angulo diagnosed probable muscular contractions although he felt plaintiff should be observed for a herniated disc in the lumbar area. The doctor told plaintiff to rest for about 10 days and take pain medication and thereafter he could work.

Plaintiff returned to the vessel an essentially did rest for 10 days. He then resumed working for 108 days, notably, stacking the net and acting as navigator for a month. he also regularly climbed the 50 foot mast to look for fish. During the voyage, and after the salt accident, plaintiff suffered several injuries to his right arm. He was hit on the right elbow by a fish while he was working the hopper, he slipped at the hopper and was grabbed by another crew member on the already sore right elbow, he was kicked in the right elbow while climbing the mast to the crow's nest, and he strained the tendons and muscles of his right wrist while arm wrestling with Matt Giacalone. In early March 1983, plaintiff decided to leave the Andrea C while she was in port to off-load another injured crew member.

Plaintiff returned to San Diego approximately March 8, 1983. On March 11, 1983 he saw Dr. Handler, an orthopedic specialist, who subsequently diagnosed two probable herniated discs (L4-L5, L5-S1). A double laminectomy and fusion was performed on the L4-5 and L5-S1 discs on April 11, 1983. After surgery, plaintiff improved and then began retrogressing. Dr. Handler diagnosed a herniation of L3-L4 and nerve root compression on L4-L5 and S1. On June 11, 1984 a second surgery was performed during which a bilateral laminectomy and fusion of L3-L4 was

completed and the L4-L5 and S1 nerve roots were decompressed.

Dr. Handler testified that, in his opinion, the scar tissue from the two surgeries and the rigidity of the lower spine will cause plaintiff to have back problems for the rest of his life. He testified that plaintiff is capable of light work. In the doctor's opinion, plaintiff's pain, weakness of leg, and concern for the safety of the discs above those fused will cause plaintiff to have limited movement. In essence, Dr. Handler's opinion is that plaintiff cannot return to jobs involving heavy labor such as those involved in tuna fishing.

After his surgery in April 1983, plaintiff did not work until late 1985, when he commenced working 25 hours her week as an assistant at his father's liquor store. Previously physically active, plaintiff's physical activities currently are severely limited. Plaintiff claims he aspired to make a career out of tuna fishing. He had obtained a mate's license; his last voyage was his first hands-on experience as a navigator, which position he assumed for one month in January 1983 after a helicopter accident injured the captain. He sat for the Masters test, passing all but celestial navigation.

Plaintiff seeks damages for loss of earnings and the pain and suffering he claims are caused by the injury to his back sustained while unloading salt. His wife claims damages for loss of consortium. His theory of liability is as follows: (1) the presence of salt on the back of the truck due to defective (leaky) salt bags and/or the lack of adequate supervision/work methods while unloading the salt caused him to slip on the salt while carrying a salt

bag; (2) the slip and fall caused three herniated discs which had to be fused;[1] and (3) the treble fusion rendered plaintiff unable to return to the tuna fishing industry, severely limits his physical abilities, and causes him severe pain and suffering.

A. Jurisdiction Over the Seaworthiness and Negligence Claims

Plaintiff alleges that the court has subject matter jurisdiction over the instant case based upon the Jones Act claim, 46 U.S.C. § 688, and the claim in admiralty for unseaworthiness. Defendant does not challenge the court's jurisdiction over the Jones Act claim. It is well-settled that the coverage of the Jones Act depends not on the place where plaintiff's injury is inflicted but on his status as a seaman acting in the course of his employment. *See O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943).

Defendant challenges the court's admiralty jurisdiction on the ground that plaintiff cannot, as a matter of law, maintain a claim for unseaworthiness based on the facts herein. Defendant bases its challenge to the court's admiralty jurisdiction upon *Victory Carriers, Inc. v. Law,*

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[1] Plaintiff had a double laminectomy (L4-5, L5-S1) in April 1983. Approximately one year later, he had a fusion of L3-4. Plaintiff argues that the fall on the salt caused all three discs to herniate. The medical evidence reasonably suggests that rigidity of L4-L5, L5-S1 caused by the double fusion put stress on and caused the herniation of L3-L4. For purposes of this case, either theory would allow plaintiff to recover, should defendant be liable for the injury occurring in November 1982.

404 U.S. 202 (1971). The Ninth Circuit has interpreted *Victory Carriers* as standing for the general proposition that admiralty jurisdiction is lacking when a longshoreman is injured while he is working on a pier and his injuries are caused *exclusively* by pierside equipment. *Huser v. Santa Fe Pomeroy, Inc.*, 513 F.2d 1298 (9th Cir. 1975).

Like the court in *Huser*, this court finds that the circumstances of the instant case are more analogous to those of *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). The decision in *Gutierrez* turned not on the function the stevedore was performing at the time of his injury (i.e. loading or unloading) but upon the fact that his injury was caused by an appurtenance of a ship, the defective cargo containers, which the court held to be an "injury, to person . . . caused by a vessel on navigable water" which was consummated ashore under the Admiralty Extension Act, 46 U.S. § 740.

In the instant case, defendant's crew accepted the delivery of salt and exercised dominion and control over it when members of the crew commenced the process of loading it onto the boat. The salt, therefore, became an appurtenance of the ship under the holding of *Gutierrez* and any injury caused thereby, even if it occurred on land, is cognizable in admiralty under the Admiralty Extension Act. Hence, the court rules it has jurisdiction over plaintiff's claim for unseaworthiness as well as the claim based on the Jones Act.

B. Liability

To find defendant liable under either the Jones Act or this court's general admiralty jurisdiction, the court must

first find that plaintiff slipped on loose salt on the bed of the truck. This finding is the basis for all of plaintiff's theories of liability under both the negligence and unseaworthiness claims. These theories are accepting defective cargo (leaking salt bags); providing an unsafe work place (the presence of loose salt on the bed of the truck); providing inadequate supervision or work methods (the presence of salt on the truck bed required more men to pass the salt bags so a seaman wouldn't slip, or necessitated a cargo net on the back of the truck so seamen wouldn't walk on the salt, or required a sweeper to clear salt).

The court has reviewed all the evidence in the case and considered all exhibits received in evidence. This court does not find plaintiff has met his burden of proving by a preponderance of evidence that he slipped on the salt. The evidence is at least equally persuasive that plaintiff lifted the salt bag and hurt his lower back, a lower back previously weakened by several other injuries. This finding is based on three categories of evidence: (1) statements made be plaintiff and crew members at or around the time of the injury; (2) plaintiff prior medical problems; and (3) plaintiff's testimony as to how he lifted the salt bags.

1. Statements

The court notes that the pretrial statements and trial testimony are riddled with controversy and inconsistencies. Many witnesses testified at trial that plaintiff told them shortly after the accident that he slipped; one claims he saw the fall. This testimony was rebutted by prior inconsistent statements of the same witnesses and by

written reports made by other witnesses shortly after the incident. As Matt Giacalone said on the tape of 1/26/84, "[I]f only I had a movie of it I could tell you." Since there is no movie, the court must weigh the credibility of the witnesses. In so doing, the court finds reliable statements point to the conclusion that plaintiff injured his back while lifting a salt bag, and not be slipping on the salt. Hence, this court finds plaintiff did not sustain his burden of proof. In so finding, the court relies on the following:

(1) The testimony of Dr. Angulo, the Panamanian doctor who treated plaintiff the day after the accident. Dr. Angulo testified, and his medical records reflect, plaintiff told him he had lifted a heavy object and felt intense pain in the lumbrosacral spine. Dr. Angulo testified a slip or fall would have been significant and would have been noted as he would be concerned about a fracture had such been mentioned. There was no notation concerning a slip or fall in the medical reports.

(2) The tapes statement of Matt Giacalone of April 27, 1983. Mr. Giacalone was standing next to plaintiff on the truck when plaintiff injured himself. He stated in a taped response to questions from the claims adjustor five months after the incident:

> (Claims Adjustor)
> Q. What happened.
>
> (Mr. Giacalone)
> A. He went to lift a sack and apparently he was in the wrong position or something but he grabbed his back and kind of laid down.
>
> Q. Did he slip or fall or anything like that.

A. Not that it – It was more like he was in a stationery position and he went to lift and then something went wrong.

. . .

Q. Did Harry seem to slip or catch his feet on anything or anything like that as far as you are aware?

A. No, not that I'm aware of.

Q. Did it appear that he just picked it up wrong or something?

A. That's the way it looked to me. It was a stationary – you know, he was lifting it up and he just stopped – he dropped it and kind of sat down and then laid down.

(3) The testimony and written notes of Tuck Arnold, and insurance adjustor. Mr. Arnold made written notes of a phone conversation he had with plaintiff between March 11, 1983 and March 17, 1983 shortly after plaintiff returned and after plaintiff's first visit to his treating physician, Dr. Handler. Mr. Arnold's notes, as well as testimony, reflect plaintiff told him he was throwing salt sacks, his legs buckled, and he fell down.

(4) Dr. Handler's written report concerning his first appointment with plaintiff after plaintiff returned home. The notes state:

> He [plaintiff] states that while working as a commercial tuna fisherman on the Andrea C on 11/17/82, when the boat was in Panama, he was throwing salt sacks and he states that in the process he had to twist his back and the salt sacks weight 100 pounds. He stated that as he was doing one of them, he states that he had

severed pain in his low back and it gave on him, and he fell down.

(5) Louis Castagnola's testimony. He is and was the general manager of the Andrea C. He testified that on the day of the accident he asked plaintiff what happened, and plaintiff said he picked up something and hurt his back. Castagnola then arranged for medical treatment for plaintiff.

2. Plaintiff's Prior Medical Problems

Concerning plaintiff's prior medical problems, the court notes that the condition of plaintiff's lower back, prior to November 1982, is an controverted as is the cause of the incident. This is true primarily because Dr. Handler, plaintiff's treating physician for six years prior to the incident and the treating physician after it, recanted his prior diagnoses. Nevertheless, by a preponderance of the evidence, this court finds that prior to November 1982, plaintiff had at least one bulging disc (L4-5), discogenic disc disease, and nerve root compression. These preexisting conditions make it likely that plaintiff injured his back in the process of lifting the salt bag as the previously discussed statements indicate.

There is no evidence the Captain or owners of the Andrea C were aware of the nature and extent of plaintiff's lower back problems. All witnesses who testified generally agreed a reasonably fit seaman is able to carry one hundred pound bags of salt; based upon this testimony, this court so finds. Hence, no liability can be predicated upon requiring plaintiff to load salt. The finding that plaintiff suffered from preexisting lower back

problems that corroborate an injury caused by lifting the salt is based on the following.

(1) Medical records of 11/21/77 reflect that plaintiff went to Dr. Handler complaining of low back pain to the left after fishing on the Sea Hawk. After an examination and x-rays the doctor diagnosed the following: "The patient probably has a disc problem." The doctor prescribed a back brace.

(2) Medical records of 1/21/80 reflect that after fishing on the Anne M., plaintiff went to Dr. Handler complaining of low back pain, bilateral groin and testicular pain, and numbness in the legs.[2] After exams and an x-ray, Dr. Handler diagnosed a herniated disc, L4-5, L5-S1, though his notes do reflect he felt a need to rule out genitouriary pathology and inflammatory pathology.

(3) Medical records of 8/10/81 reflect that, after fishing on the Cabrillo, plaintiff went to Dr. Handler complaining of back pain, upper and lower lumbar. Again, after an exam and x-rays, subsequent treatment notes reflect Dr. Handler's observation, "(i)t appears the patient is having nerve root compression on the left side. However, the patient at this time would like to continue to try and work. He has a fairly good opportunity, but I feel that the patient somewhere along the line is probably going to need surgery." X-rays revealed a bone spur on

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[2] Ironically, Dr. Handler's notes reflect, "The patient states that prior to this he was able to lift 200 pounds of salt at one time; now he has a hard time lifting a 100-pound sack and when he does he has a lot of pain.

L4, questionable narrowing of L4-5 and a spina bifida occult of S1.

Dr. Handler testified at trial that his prior diagnoses in 1977, 1980 and 1981 were incorrect and that plaintiff really suffered back sprains at those times. Dr. Handler testified that his revised opinion was that plaintiff suffered the "herniated"[3] discs when he fell on the truck. He testified to some surgical findings which would tend to support this conclusion. Other surgical findings, notably the presence of bone spurs, do not. Dr. Handler also testified that the fact plaintiff returned to work on the three prior occasions, and he did not after the incident in November 1983 support his revised opinion.

The court finds unpersuasive Dr. Handler's trial testimony. Dr. Handler's medical records do not support his opinion. For example, the 1981 x-rays show a probable narrowing of L4-5, a bone spur, and spina bifida occult on S1. On several occasions, Dr. Handler found moderate weakness of the great toe extensor, indicating nerve root compression.

The court finds credible Dr. Cummings' testimony that a bone spur indicates discogenic disc disease of at least two years' duration; further, I find credible his diagnosis of discogenic disc disease and nerve root compression based upon his review of the records, examination of plaintiff, and review of the x-rays and mylegram.

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[3] It appeared at times as if Dr. Handler used the term herniated to mean "ruptured" or "extruded," and at times to mean "bulging."

Additionally, as he had done in the past, plaintiff returned to work after the alleged injury due to the salt loading. He remained on the vessel 108 days after the incident. After resting two weeks, plaintiff stacked net, drove the boat, climbed the fifty foot mast 2-7 times a day, and loaded fish into a hopper. He suffered three injuries to his elbow (outlined earlier in this decision) and in February he strained his wrist while arm wrestling in a bar.[4]

In sum, based on the medical records and testimony, this court finds that prior to November 1982, plaintiff was suffering from at least one bulging disc (L4-5) discogenic disc disease (L4-5), and a structural problem at S1 (spina bifida occult). These conditions made his lower back particularly susceptible to lower back strain.

3. Plaintiff's Method of Loading Salt

One of the few items about which there is no controversy is how plaintiff was lifting and carrying the salt bags. He testified he picked them up by grabbing two loose corners on the longer side (the bags wre rectangular). He then carried the bag by the corners to the edge of the truck and swung the salt bag, dropping it into the cargo net on the dock. Plaintiff had been a seaman for six years prior to the incident so he was quite familiar with the weight and bulk of salt bags. The court notes that this

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[4] The court notes in passing that after the salt bag incident plaintiff never requested to leave the vessel though it went into port three times to offload or onload personnel. Further, the ship's log reflects plaintiff finally left the ship due to elbow problems.

method of lifting and carrying salt bags put the strain of lifting and carrying on plaintiff's lower back. The manner in which plaintiff carried the bags caused his lower back, not his thighs, to carry the weight. The significance of this finding is that his method of lifting and carrying the salt, when considered with his preexisting lower back problems, circumstantially supports statements discussed earlier that plaintiff hurt his back while lifting a salt bag. In sum, his manner of carrying salt bags and his preexisting back problems make it more likely than not that "[I]t was a stationary – you know, he was lifting it up and he just stopped – he dropped it and kind of sat down and then laid down." Statement of Matt Giacalone 4/27/83.

The court feels sympathy for plaintiff and his wife. Further, it admires the hard work and expertise counsel for both sides displayed in this lawsuit.

Conclusion

Based upon the findings of fact and conclusions of law, this court finds:

(1) There is jurisdiction over plaintiffs' claim for unseaworthiness.

(2) Plaintiff has not proved by a preponderance of evidence that defendant was negligent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY M. CARVALHO, Plaintiff-Appellant-Cross-Appellee, v. "ANDREA C," her engines, tackle, apparel and furniture; ANDREA C FISHING CORPORATION, a corporation, Defendants-Appellees-Cross-Appellants	Nos. 86-6484, 86-6541 87-6675 D.C. No. CV-84-1516-K MEMORANDUM* (Filed July 14, 1989)

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted April 5, 1989
Pasadena, California

Before: WALLACE and FLETCHER, Circuit Judges, and GEORGE,** District Judge.

Seaman Harry M. Carvalho appeals the district court's judgment after a bench trial for the defendant vessel, the M/V "Andrea C", denying damages for injuries based on either unseaworthiness of the vessel or

* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Circuit Rule 36-3.

** Hon. Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

negligence of the Andrea C Fishing Corporation. He also seeks review of the district court's order denying his motion for a new trial under Rule 60(b)(1). The defendants below filed a cross-appeal, arguing that the district court lacked jurisdiction over the seaworthiness claim. We affirm.

I.

FACTS

Appellant Harry M. Carvalho was a tuna fisherman employed as a crew member of the defendant vessel, the "Andrea C." In November of 1982, the "Andrea C" was sent to Panama to pick up a truckload of salt bags which were to be delivered at sea to a sister ship, the M/V "Uncle Louis."

On the date of Carvalho's injury, the "Andrea C" was tied up parallel to a dock in Panama. A large flatbed truck, loaded with more than 100 sacks of salt weighing approximately 100 pounds each arrived at the dock and parked parallel to the vessel. According to Carvalho, the supervisor ordinarily in charge of loading salt is the deckboss, but no deckboss had been hired for the vessel at the time of the accident. Consequently, Navigator Matt Giacalone was in charge of the loading procedure. Giacalone ordered Carvalho and several other members of the crew to assist in unloading the salt bags from the truck, and loading them onto the vessel. Apparently, specific crew members were not assigned specific tasks. Rather, they assigned themselves to perform different aspects of the job.

The loading method worked as follows: one crew member spread a cargo net on the dock, between the truck and the vessel; other members of the crew climbed onto the back of the flatbed and threw the bags down from the truck onto the cargo net. When the net was full, it was hooked up to the ship's "cherry-picker," and its contents dropped into the ship's hold. Other crew members stacked the salt bags in the hold.

Appellant Carvalho and Matt Giacalone were the only two crew members unloading bags from the back of the flatbed. Giacalone was positioned on the side of the truck nearest the cargo net. He simply pulled sacks off the stack and swung them out and into the cargo net. Carvalho's position was on the other side of the flatbed. From this position, Carvalho was required to pick up a bag, carry it six to eight feet across the truck and swing it out to drop it into the cargo net. It is undisputed that the bed of the truck was covered with loose salt.

During the unloading of the salt, Carvalho injured his back. Over three months later, orthopedic specialist Dr. Handler diagnosed Carvalho as having two herniated discs and performed surgery. Carvalho's condition worsened, and a second surgery was performed in June of 1984. Because of Carvalho's continuing back problems, Dr. Handler testified that Carvalho cannot return to jobs involving heavy labor, such as the one he performed prior to sustaining his injury.

Carvalho brought this action under the Jones Act, 46 U.S.C. § 688, alleging negligence on the part of the defendant, and in admiralty, claiming that his injury was

caused by the unseaworthiness of the vessel. The parties waived a jury trial.

The district court concluded that Carvalho failed to establish that his injuries were caused either by unseaworthiness, or by the defendant corporation's negligence. Judgment for the defendants was entered on July 11, 1986.

Carvalho's motion for a new trial under Fed. R. Civ. P. 59, was denied on October 1, 1986. Carvalho appealed. The defendants filed a cross-appeal, contesting the district court's finding that it had jurisdiction over the seaworthiness claim. By order dated April 30, 1987, the case was remanded to the district court for the purpose of obtaining a ruling on Carvalho's proposed motion for a new trial under Fed. R. Civ. P. 60(b). Judge Keep entered an order denying the Rule 60(b) motion on October 26, 1987. Carvalho filed a timely notice of appeal. We have jurisdiction over the consolidated appeals under 28 U.S.C. § 1291.[1]

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[1] We reject the defendants' argument that Carvalho's notice of appeal was deficient because it purported to appeal only the denial of the Rule 59 motion, and not the underlying judgment. Although an appeal such as this one should be undertaken from the judgment itself rather than from an order denying a motion for a new trial, a mistake in designating the order being appealed from is not fatal if the intent to appeal the underlying judgment fairly can be inferred and if the appellee is not prejudiced by the mistake. *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987). We find that both requirements outlined in *McCarthy* are satisfied here.

II.

DISCUSSION

During the trial, Carvalho argued that the lack of proper supervision of the unloading process, the presence of too few crew members to do the job, and the presence of loose salt on the surface of the truck bed combined to create unsafe working conditions, and that these unsafe conditions caused Carvalho to injure his back. After hearing all of the testimony, the trial judge found that Carvalho failed to establish that the vessel was unseaworthy or that the defendant corporation was negligent. The court found that Carvalho's injury resulted from a pre-existing back condition. Carvalho challenges these findings.

The district court's determination that the corporation was not negligent is reviewed under the clearly erroneous standard. *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985). The court's finding that the vessel was seaworthy is subject to the same standard of review. *Craig v. M/V Peacock*, 760 F.2d 953, 957 (9th Cir. 1985) (magistrate's finding of seaworthiness not clearly erroneous); *see also Taisho Marine & Fire Ins. Co. v. M/V Sea-Land Endurance*, 815 F.2d 1270, 1272-73 (9th Cir. 1987) (district court's determination that the vessel was seaworthy and the loss of cargo was from a "peril of the sea" reviewed under the clearly erroneous standard). Where the trial court's factual findings rest in large measure upon its determination of the credibility of the witnesses, extreme deference is afforded those findings. *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985).

Carvalho's major challenge to the district court's findings is that the district court failed to address one of Carvalho's theories of recovery. He points to the following statement in the district court's Findings of Fact and Conclusions of Law:

> To find defendants liable under either the Jones Act or this court's general admiralty jurisdiction, the court must first find that plaintiff slipped on loose salt on the bed of the truck. This finding is the basis for all of plaintiff's theories of liability under both the negligence and unseaworthiness claims. These theories are accepting defective cargo (leaking salt bags); providing an unsafe work place (the presence of loose salt on the bed of the truck; providing inadequate supervision or work methods (the presence of salt on the truck bed required more men to pass the salt bags so seamen wouldn't slip, or necessitated a cargo net on the back of the truck so seamen wouldn't walk on the salt, or required a sweeper to clear salt).

Supplemental Excerpts of Record (SER) at 7. Weighing the credibility of the witnesses, the court found that Carvalho did not slip on the salt, but injured his back lifting the salt. *Id.* at 8.

Carvalho maintains that the district court's analysis represents a misunderstanding of his theories of liability. He argues that the work method employed in the unloading process, which required Carvalho to pick up, carry, and throw 100-pound sacks of salt was inherently dangerous, regardless of the existence of loose salt on the truck bed. Carvalho presented expert testimony at trial suggesting that having two men, rather than one, lifting

each salt bag would have been a safer method of unloading the salt. He contends that the dangerous work method (one man lifting) caused his injury, and that this provides a basis for the defendants' liability even if we accept the district court's finding that he did not sustain his injury as a result of slipping on loose salt.

Carvalho cites several cases, including *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967), which establish that an improper work method, such as the assignment of too few crew members to safely perform the assigned task, renders a vessel unseaworthy. The defendants do not dispute this general statement of the law. However, to recover, Carvalho must establish that, in fact, the work method was unsafe because too few crew members were assigned to the task, and that those unsafe work methods caused his injury. After reviewing the district court's findings and the record below, we conclude that the district court addressed, and rejected, this theory of liability, and that the district court's findings were not clearly erroneous.

The district court's findings contained the following statement:

> All witnesses who testified generally agreed a reasonably fit seaman is able to carry one hundred pound bags of salt; based upon this testimony, this court so finds. Hence, no liability can be predicated upon requiring plaintiff to load salt.

SER at 10-11. Although this finding could have been drafted more artfully, we interpret it as an explicit rejection of Carvalho's theory that requiring him to lift the bags by himself was an unsafe work method.

This finding is not clearly erroneous. While Carvalho points to testimony indicating that it would have been safer to employ a different method of unloading, there was also evidence that requiring one reasonably fit seaman to move 100 pounds sacks of salt is not unreasonable. Even Carvalho's expert witness, Norman Mezin, admitted that the possibility of slipping was the main factor requiring the use of more than one man per sack. That was revealed in cross-examination through the following exchange:

> Q. Assume one other fact. Assume he [Carvalho] didn't slip. You would expect a reasonably good seaman to be able to walk across and pick up a sack of salt, walk across the bed of that truck with salt on it, he didn't slip, you would expect that he was reasonably fit, not to have him pop his back, wouldn't you?
>
> A. Gee, I'd hope so.

Reporter's Transcript (RT) at 1067. This testimony is consistent with other testimony suggesting that reasonably fit seamen are capable of performing lifting tasks similar to the one performed by Carvalho. The district court's ultimate findings that requiring individual seamen to lift and carry one hundred pound bags of salt did not create an unseaworthy condition or constitute negligence are not clearly erroneous.

Carvalho also challenged the district court's denial of his Rule 60(b)(1) motion for relief from judgment. Carvalho's motion challenges the court's admission of evidence gleaned from the written notes of claims adjustor Tuck Arnold on the basis that the evidence was a

"surprise" because the de
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notes. The district court's
motion is reviewed for a
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F.2d 1334, 1338 (9th Cir.

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Cir. 1969) (affirming refu
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III.

CLUSION

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that the district court lacked jurisdiction over Carvalho's seaworthiness claim.

AFFIRMED.

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-638

In The

Supreme Court of the United States

October Term, 1989

HARRY M. CARVALHO,

Petitioner,

v.

M/V ANDREA C, her engines, tackle, apparel and furniture; and ANDREA C FISHING CORPORATION, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS STATED ADEQUATE GROUNDS UNDER SUPREME COURT RULE 17 FOR THIS COURT TO GRANT CERTIORARI.

II. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED SEAMEN BY THE DOCTRINE OF UNSEAWORTHINESS.

III. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMEN UNDER THE JONES ACT.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, HARRY M. CARVALHO, and Respondent ANDREA C FISHING CORPORATION, owner of the vessel M/V ANDREA C.

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No. 89-638

In The

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October Term, 1989

HARRY M. CARVALHO,

Petitioner,

v.

M/V ANDREA C, her engines, tackle, apparel and furniture; and ANDREA C FISHING CORPORATION, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent ANDREA C FISHING CORPORATION, respectfully prays that writ of certiorari be denied to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been certified for publication. It is

attached in the appendix of Petitioner CARVALHO's Petition for Writ of Certiorari at page A-15.

The opinion of the United States District Court for the Southern District of California is only partially attached in the appendix of Petitioner CARVALHO's Petition for Writ of Certiorari at page A-1. The missing portion of the District Court opinion is in the Court's conclusion as follows:

(3) Plaintiff has not proved by a preponderance of the evidence defendant vessel was unseaworthy.

(4) Judgment shall be entered for defendant.

JUDITH N. KEEP, Judge
United States District Court

JURISDICTION

Petitioner asserted Federal jurisdiction in the District court under 46 U.S.C. Section 688 (The Jones Act) and under general maritime law. On appeal as of right by Petitioner, the Ninth Circuit affirmed the District Court's decision in all respects on July 14, 1989.

Petitioner now requests this Court review the decision of the Ninth Circuit pursuant to 28 U.S.C. Section 1254 (1). This Court's power to review pursuant to 28 U.S.C. Section 1254 (1) is discretionary in accordance with Supreme Court Rule 17 guidelines. This Court should refuse to exercise its power to review this case, as the issues raised herein meet neither the specific criteria for review nor the "special and important reasons" standard set forth in Rule 17. Rather, Petitioner seeks merely to

have this Court "retry" the factual determinations made by the District Court.

STATEMENT OF THE CASE

Petitioner was the navigation officer of the vessel M/V ANDREA C at the time of his accident on November 17, 1982. At the time of the injury, the Master of the vessel, Matt Giacalone, was working with Petitioner on a flatbed truck owned by a salt company and parked by the salt company on a dock in Panama. The truck bed had approximately 100 salt sacks stacked on it, which were to be unloaded from the truck and loaded onto the vessel.

Petitioner was not specifically ordered to unload the truck, but rather responded to a general request for assistance in unloading salt from the truck. Petitioner positioned himself on the flatbed and assigned himself the task to take the sacks off the back of the truck and throw them onto a cargo net on the ground. Sufficient men were available to help Petitioner on the flatbed. Petitioner's method of unloading salt was to pick up each rectangular salt sack by the corners of the long side, carry the bag across the truck bed, swing it out and drop it onto the cargo net spread on the dock below. This method of carrying the bags put strain on Petitioner's lower back, rather than on his thighs.

Petitioner had pre-existing back injuries of at least one bulging disc at L4-L5, discogenic disc disease and nerve root compression, but he never disclosed these back problems to Respondent prior to the accident. As Petitioner was lifting his first ten sacks, and perhaps only

his fifth or sixth sack, he experienced pain in his back.[1] Petitioner then sat down. His foot did not slip on salt, nor did he fall before he experienced pain in his back. He rested for ten days after this incident then resumed vigorous work for 108 days. He finally complained of his injuries in March of 1983, almost four months after the salt sack incident.

At trial, Petitioner contended he injured his back when he slipped on loose salt and fell. The District Court, however, found that Petitioner injured his lower back, which had been weakened by several prior injuries, when he lifted a salt bag, and that no negligence or unseaworthiness was involved. The District Court also specifically found that Petitioner did not slip and fall on loose salt, and that Respondent did not know of Petitioner's prior back injuries.

The Ninth Circuit affirmed the District Court, adopting the District Court's finding that a reasonably fit seaman is able to carry 100 pound sacks of salt. Moreover, it determined that the District Court's findings of no negligence or unseaworthiness were not clearly erroneous. The Ninth Circuit concluded that the work method employed in unloading the salt sacks was not inherently dangerous. In fact, Petitioner's own expert witness testified that the method of unloading salt sacks was reasonable and safe.

---

[1] All facts stated here, except this particular fact, are listed in the District Court and Ninth Circuit findings at Appendix A to Petitioner's Brief. This particular fact was stated by Petitioner at trial in the transcript at pages 806, 922-23.

REASONS FOR NOT GRANTING THE WRIT

I.

PETITIONER CARVALHO HAS NOT STATED GROUNDS UNDER SUPREME COURT RULE 17 FOR THIS COURT TO GRANT CERTIORARI

Petitioner has not stated any compelling grounds for this Court to grant Certiorari. Supreme Court Rule 17 states that this Court, in its discretion, can grant review on writ of certiorari for splits of authority, decisions on "important questions" of federal law, departure by a court of appeal from the accepted and usual course of judicial proceeding, to exercise its supervisory powers, or for any other "special and important" reason. Petitioner's request does not fall within any of the grounds enumerated in Rule 17, and is hardly a case so "special" or "important" to warrant this Court's attention. Simply stated, Petitioner wants this court to retry settled findings and overturn existing, settled law, or not apply it to Petitioner, because its application to Petitioner, in his view, would be unfair.

Petitioner contended at trial he slipped and fell. In the face of the District Court findings, Petitioner has now abandoned that theory and has pressed a new theory in the Ninth Circuit and here. Petitioner's new theory is that the work method which allegedly required him to carry 100-pound sacks of salt a short distance for "45 minutes to an hour" constituted unseaworthiness or vessel owner negligence. Petitioner's factual premises for this argument, however, are at odds with the District Court's findings, and existing law. *See Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

The relevant facts as found by the District Court and affirmed by the Ninth Circuit are as follows: Petitioner assigned himself to move salt sacks and was injured due to a pre-existing back injury (See page A-19 of Petitioner's Brief); a reasonably fit seaman could perform the same salt-moving task (See page A-21 of Petitioner's Brief); and Petitioner failed to inform Respondent of his prior back injuries (See page A-10 of Petitioner's Brief).

Petitioner now disputes, or at least disregards, these findings of fact. In short, Petitioner would have the United States Supreme Court review and retry the facts in this case. This is not a compelling basis for granting writ of certiorari under Supreme Court Rule 17.

II.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED SEAMAN BY THE DOCTRINE OF UNSEAWORTHINESS

As a premise to this issue, Petitioner incorrectly states the Ninth Circuit and District Court's decisions. The District Court specifically found: "There is no evidence the Captain or owners of the ANDREA C were aware of the nature and extent of plaintiff's lower back problems." (See page A-10 of Petitioner's Brief.) Without this knowledge, a vessel is not required to protect or indemnify a seaman for injuries resulting from hiring employees who are physically or emotionally unable to perform their duties. *OSCEOLA*, 189 U.S. 158 (1903); *Boudin v. Lykes Brothers Steamship Co.*, 348 U.S 336 (1955). Therefore, the Ninth Circuit decision affirming the District Court does not conflict in principle with an historical

duty to protect seamen, but rather focuses on the requirement of an actionable nexus between the vessel and the seaman.

III.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMAN UNDER THE JONES ACT

The Jones Act of 1920, currently codified as 46 U.S.C. Section 688 (1976), permits recovery against a vessel for a breach of duty that produces injury to a seaman. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). Applying this test, the Ninth Circuit here determined that the District Court's findings of fact did not support a breach of duty by Respondent. (See pages A-14 and A-22 of Petitioner's Brief.) Instead, the District Court found that a reasonably fit seaman can be expected by his employer to safely lift and move 100 pound sacks of salt. (See page A-22 of Petitioner's Brief.)

As a premise to this issue, Petitioner incorrectly states the evidence to the effect Petitioner was injured after 45 minutes to one hour of moving salt sacks. In fact, Petitioner himself testified at trial that he carried only five or six bags of salt, at most ten, before he was injured. (See *supra* note 1.) In addition, the District Court determined, and the Ninth Circuit affirmed, that a reasonably fit seaman can carry multiple bags of salt over time, given that the District Court used the word "bags", not "bag". (See page A-10 of Petitioner's Brief.) In any event, Petitioner admits in his Brief he failed to elicit testimony or to request a specific finding on this allegedly "critical" issue

of how long Petitioner could safely carry the salt sacks. Rule 17 does not permit Petitioner now, for the first time, to raise his own failure to provide adequate evidence at trial as a basis to gain access to review by the Supreme Court on Writ of Certiorari.

IV.

CONCLUSION

Respondent respectfully requests, for the reasons stated, that the Petition for Writ of Certiorari be denied.

DATED: November 10, 1989

Respectfully submitted,

H. LAWRENCE SERRA
Counsel of Record

EDWARD C. WALTON
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